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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

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No. 269

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EARL PRICE

*Petitioner,*

v.

THE STATE OF GEORGIA

*Respondent.*

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## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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## BRIEF FOR THE RESPONDENT IN CERTIORARI

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### OPINIONS BELOW

The judgment of the Supreme Court of Georgia denying the application for certiorari to review the judgment of the Georgia Court of Appeals is unrecorded, but it is docketed as Case No. 24879, said denial being dated September 24, 1968.

The controlling decision in this matter and the decision from which the application for certiorari was filed

in the Supreme Court of Georgia is reported at 118 Ga. App. 207, 163 S.E.2d 243 (1968).

The opinion of the Court of Appeals of Georgia reversing the Petitioner's first conviction is reported at 108 Ga. App. 581, 133 S.E.2d 916 (1963).

## JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's brief on the merits.

## QUESTIONS PRESENTED

1. Is the double jeopardy clause of the Fifth Amendment applicable to the states through the Fourteenth Amendment? (Petitioner's Questions 2 and 4).

2. Is the holding of this Court in *Benton v. Maryland*, 395 U.S. 784 (1969) applicable to the facts in the instant case? (Petitioner's Questions 1, 3 and 5).

3. Should the holding in the case of *Benton v. Maryland*, 395 U.S. 784 (1969) be made retroactive? (Petitioner's Question 5).

## CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the amendments to the Constitution of the United States are set forth in Petitioner's brief on the merits at pages 2-3.

## ARGUMENT

### THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IS APPLICABLE

TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

The merits of Petitioner's Questions 2 and 4 have been resolved by this Court in the case of *Benton v. Maryland,* 395 U.S. 784 (1969), wherein this Court specifically stated "that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment." *Id.* at 787.

THE HOLDING IN *BENTON V MARYLAND,* 395 U.S. 784 (1969), APPEARS TO MAKE APPLICABLE TO THE FACTS IN THE INSTANT CASE CERTAIN OTHER UNITED STATES SUPREME COURT CASES DECIDED PRIOR AND SUBSEQUENT TO *BENTON V. MARYLAND, SUPRA.*

The Respondent is, of course, aware of the case of *Green v. United States,* 355 U.S. 184 (1957), which set out the "implicit acquittal" concept. *Cf. North Carolina v. Pearce,* 395 U.S. 711, 746 (1969) (Dissent of Mr. Justice Harlan). The Respondent is also aware that this Court has apparently recognized that an "implicit acquittal" is to be construed in the same manner as an acquittal in fact. *North Carolina v. Pearce, supra,* at 717, fn. 9; Id. at 720, fn. 16.

The Respondent submits however that the instant case is factually distinguishable from other double jeopardy cases decided by this Court with the exception of *Cichos v. Indiana,* 385 U.S. 76 (1966), wherein this Court declined to rule on the merits. Although it would seem that the Petitioner was placed in jeopardy a second time in the same manner that Green was in *Green v. United*

*States*, 355 U.S. 184 (1957), the Respondent contends that the fact that the Petitioner in the instant case was convicted of the same offense in his second trial as he was at his first trial, should mitigate the effect and applicability of *Green v. United States, supra.* Although the standard for determining jeopardy is not whether one is punished twice, but, rather, it is whether or not he has twice been put in jeopardy, *United States v. Ball*, 163 U.S. 662, 669 (1896), the Respondent submits that it was "harmless error" when the jury returned a verdict of manslaughter after Petitioner's second trial.

The holding in *Hetenyi v. Wilkins*, 348 F.2d 844 (2nd Cir. 1965), that "there was a reasonable possibility that the conduct of the trial and the deliberations of the jury were affected by the fact that [the defendant] was indicted, prosecuted and charged with first-degree murder", *Id.* at 864, has not yet been made the holding of this Court in a case factually similar to the one now before this Court. The holding in the *Hetenyi* case, *supra*, when applied to the facts in the instant case, presumes that the jury did not or would not do its duty in fairly considering the evidence then before it. Certainly it cannot be said that the trial jury did not meet the obligation placed upon it to fairly determine the evidence as it is evident that the trial jury considered the charge of the court on murder (A. 31) not to be applicable inasmuch as it returned a manslaughter conviction. The premise set out in *Hetenyi v. Wilkins, supra*, at 866, is that the jury could not fairly evaluate the evidence then before it for it also had to consider the merits of the charge of murder. The Respondent submits that nothing in the record would support the proposition that the jury did not fairly meet the duty placed upon it.

For the reason that the Petitioner was convicted of the same crime on the second trial as on the first, the Respondent submits that the jeopardy that the Petitioner was placed in on his second trial was "harmless error" in accordance with the criterion set out in *Chapman v. California*, 386 U.S. 18, 21-22 (1967). For this reason the instant case is factually distinguishable from *Green v. United States, supra.*

Considering that the instant case is factually distinguishable from *Green v. United States, supra,* and *Benton v. Maryland,* 395 U.S. 784 (1969), and considering that the effect of Petitioner's second conviction for manslaughter — even though he was tried for murder — was "harmless error", the Respondent submits that the instant case does not present such a controversy of such magnitude that would require the highest court of these United States to sit and determine a factual issue which borders on the abstract. *Cf. Benton v. Maryland,* 395 U.S. 784, 788 (1969). See also *Baldonado v. California,* 366 U.S. 417 (1961), where a writ of certiorari was dismissed after oral argument and examination of the record when it appeared that the totality of circumstances failed to support the substantial due process issues tendered in the petition for certiorari.

CONSIDERING THE PURPOSE TO BE SERVED BY THE NEW STANDARD SET OUT IN *BENTON V. MARYLAND,* 395 U.S. 784 (1969), AND THE EXTENT OF THE RELIANCE BY PROSECUTING AUTHORITIES ON THE OLD STANDARD, AND THE EFFECT ON THE ADMINISTRATION OF JUSTICE OF THE RETROSPECTIVE APPLICA-

TION OF THE NEW STANDARD, *BENTON V. MARYLAND, SUPRA,* SHOULD NOT BE MADE TO APPLY RETROSPECTIVELY TO CASES TRIED BEFORE JUNE 23, 1969.

It is a well-acknowledged proposition that the question of which constitutional principles are to be applied retrospectively and which are not depends upon a consideration of particular relations and conduct, of rights claimed to have become vested, of status, of prior determinations deemed to have finality, and of public policy in the light of the nature of the constitutional principle and its previous application. *Linkletter v. Walker,* 381 U.S. 618, 627, 629 (1965). The *Linkletter* case, *supra,* offered certain standards which should be looked to by this Court when seeking to determine the retrospective application of a principle. This Court said that it would "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629. Expressed another way, this Court indicated that it would look to the *purpose* of the rule; the *reliance* placed upon the older doctrine; and the effect on the *administration of justice* of a retrospective application of the newer rule. *Linkletter v. Walker, supra,* at 636. And, perhaps most importantly of all, this Court indicated that it would consider whether or not the new principle went to the *fairness of the trial* — the *very integrity of the fact-finding process. Linkletter v. Walker, supra,* at 639.

In support of the "reliance" theory, the state courts have relied for many years on the proposition that the

double jeopardy provisions of the Fifth Amendment were not applicable to the states, e.g., *Brantley v. State*, 132 Ga. 573, 64 S.E. 676 (1909), *aff'd.*, 217 U.S. 284 (1910); *United States v. Lanza*, 260 U.S. 377, 382 (1922); *Brock v. North Carolina*, 344 U.S. 424, 426 (1953); *Hoag v. New Jersey*, 356 U.S. 464, 466 (1958); *Bartkus v. Illinois*, 359 U.S. 121, 127 (1959). As this Court "again and again . . . refused to reconsider *Wolf* . . ." *Linkletter v. Walker, supra*, at 637, so, too, did this Court again and again refuse to consider cases where the double jeopardy provision of the Fifth Amendment and its applicability to the states were in question. *Cf. Cichos v. Indiana*, 385 U.S. 76 (1966).

For the reasons set out in *Linkletter v. Walker, supra*, at 637, to make the rule of *Benton* retrospective would tax the administration of justice to the utmost. New trials would have to be held. Witnesses available at the time of the original trial might not be available or if located their memory might be dimmed. "To thus legitimate such an extraordinary procedural weapon that has *no bearing on guilt* would seriously disrupt the administration of justice." *Linkletter v. Walker, supra*, at 637-638 (Emphasis added.) See also *Id.* at 639 ("The fairness of the trial is not under attack.")

In *Tehan v. Shott*, 382 U.S. 406 (1966), this Court asked for a review of the identical question posed in the instant case, i.e., brief and argue the question of retroactivity [of the doctrine enunciated in *Griffin v. California*, 380 U.S. 609 (1965)]. In the *Tehan* case, *supra*, this Court adopted the premise set out in *Linkletter v. Walker*, 381 U.S. 618, 628-629 (1965), that resolution of the issue of retrospectivity requires this Court to

" 'weigh the merits and demerits in each case by looking to the prior history of the rule in each question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " Properly applying the *Linkletter* standards, this Court concluded that *Griffin v. California, supra,* would not be applied retrospectively. In arriving at that conclusion this Court considered the reliance by the states to the existing position of this Court — since 1908 — that the federal Constitution did not require the states to accord the Fifth Amendment privilege against self-incrimination. *Tehan v. Shott, supra,* at 412. Such is the situation in the instant case. Since *Palko v. Connecticut,* 302 U.S. 319 (1937), and perhaps even since *Brantley v. Georgia,* 217 U.S. 284 (1910), the states have relied upon the fiat of this Court that the double jeopardy provision of the Fifth Amendment is not applicable to the states. Thirty-two years have elapsed since the *Palko* decision and it was not until *Benton v. Maryland,* 395 U.S. 784 (1969), did this Court declare the *Palko* case to be overruled. Even since *Green v. United States,* 355 U.S. 184 (1957), this Court refused to apply to the states the principle of "implicit acquittal" enunciated in the *Green* case. See *Hoag v. New Jersey,* 356 U.S. 464 (1958). The Respondent submits that as this Court held in *Tehan v. Shott, supra,* at 413, that the misconduct of the police prior to *Mapp* had already occurred and would not be corrected by releasing the prisoners involved, so, too, has the misconduct of the prosecuting authorities already occurred and will not be corrected by releasing prisoners at this late date.

*Tehan v. Shott, supra,* also emphasized the point that the privilege against self-incrimination "[did] not re-

late to protecting the innocent from conviction, but rather to preserving the integrity of the judicial system. . . ." *Id.* at 415. The principle set out in *Benton v. Maryland, supra,* does not relate to protecting the *innocent* from conviction, for the accused still had all the procedural and substantive benefits then existing and available for his use in trial even though the second trial may have, in fact, placed him in double jeopardy. The factual situation in *Benton* presented what is probably considered the "classic" case of double jeopardy in that Benton was tried on a charge a second time after an *expressed* acquittal the first time. The instant case does not present such a factual situation for although the Petitioner was tried a second time on the same charge as he was tried the first time, he was convicted of the lesser charge on each occasion. The Respondent submits that only the concept of "implicit acquittal" enunciated in *Green v. United States, supra,* would even make the states aware of a federal standard not necessarily consistent with the laws of half of the States. See 61 A.L.R.2d 1141, 1146.

The denial of the basic rights found violated in *Griffin v. Illinois,* 351 U.S. 12 (1956), *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Jackson v. Denno,* 378 U.S. 368 (1964), would preclude a fair trial. The Fifth Amendment's prohibition against placing an accused in jeopardy more than once "is not an adjunct to the ascertainment of truth". *Tehan v. Shott,* 382 U.S. 406, 416 (1966), and thus, does *not* preclude a fair trial.

This Court carried forward the propositions set forth in *Linkletter v. Walker,* 381 U.S. 618 (1965), and *Tehan v. Shott,* 382 U.S. 406 (1966), and applied them

in *Johnson v. New Jersey*, 384 U.S. 719 (1966). The Court recognized that in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Jackson v. Denno*, 378 U.S. 368 (1964), "retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent'." *Id.* at 727-728. Additionally, the Court applied the "administration of justice" standard by determining that a retroactive application of *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), would disrupt the administration of our criminal laws. "It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence and conformity with previously announced constitutional standards." *Johnson v. New Jersey, supra*, at 731. The fact that approximately 18 states allow the retrial of the defendant for the greater offense after his successful appeal makes the above statement from *Johnson v. New Jersey, supra*, even more significant.

Clearly, the mere fact, standing alone, that the defendant was tried for murder a second time after an apparent "implicit acquittal" of murder at his first trial in no way suggests that the second trial was unfair or that the fact-finding process utilized at the second trial was constitutionally substandard. "The extent to which a condemned practice affects the integrity of the truth-determining process at the trial is a 'question of probabilities' . . . such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall v. Denno*, 388 U.S. 293, 298 (1967).

*Desist v. United States*, 394 U.S. 244 (1969), recognized the burden placed upon the "administration of justice" where there has been "reliance" by the states upon previous United States Supreme Court decisions or declined invitations to abandon old propositions. *Id.* at 248. The *Linkletter v. Walker, supra,* standards as carried forward in *Tehan v. Shott*, 382 U.S. 406 (1966), and *Stovall v. Denno*, 388 U.S. 293, 297 (1967), were relied upon for guidance by this Court in *Desist, supra,* at 249, 250-251, in giving *Katz v. United States*, 389 U.S. 347 (1967), prospective application only.

The Respondent now turns to the question of whether or not the instant case, being on review on the date of decision of *Benton v. Maryland, supra*, should be bound by Benton (and disregarding whether or not the instant case is factually distinguishable from *Benton*).

In *Johnson v. New Jersey*, 384 U.S. 719, at 732-733 (1966), are standards which, when applied to the facts in the instant case, would show that the ruling in *Benton v. Maryland, supra,* should apply only to those questionable trials beginning after June 23, 1969, the date of the *Benton* ruling. This Court clearly considered the impact of a retrospective effect to its earlier *Escobedo* and *Miranda* decisions and concluded that "to upset all of the convictions still pending on direct appeal which were obtained in trials preceding *Escobedo* and *Miranda* would impose an unjustifiable burden on the administration of justice". *Johnson v. New Jersey, Id.* at 733. Respondent urges this Court to find as it did in *Stovall v. Denno*, 388 U.S. 293, 300 (1967), that "the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction [between convictions now final and con-

victions at various stages of trial and direct review] unsupportable". *Ibid.* (Emphasis added.)

In *Johnson v. New Jersey,* 384 U.S. 719 (1966), this Court adopted the position taken in *Linkletter* and *Tehan* that the newly formulated principle would not necessarily apply to every case still pending on direct appeal on the date of that decision, and concluded that "there are no jurisprudential or constitutional obstacles" to the adoption of a different cut-off point. *Johnson v. New Jersey, Id.* at 733 (1966). As this Court held in *Desist v. United States,* 394 U.S. 244 (1969), the principle of *Katz v. United States,* 389 U.S. 347 (1967), would apply only to "cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967". *Desist v. United States, supra,* at 254. Therefore, so should this Court hold that the constitutional principle set out in *Benton v. Maryland, supra,* applies only to those cases in which the questionable trial began after the date of the *Benton* decision, i.e., June 23, 1969.

Respondent submits that even the "compelling circumstances" standard in Mr. Justice Fortas' dissent in the *Desist* case would justify making the *Benton* ruling applicable only to those cases that were tried after the date of *Benton.* See *Desist v. United States,* 394 U.S. 244, 273 (1969).

There is clear judicial authority, as supported by the cases set out above, to support the proposition (a) that *Benton v. Maryland,* 395 U.S. 784 (1969), should not be held to be retrospective, and (b) that the ruling in the *Benton* case should be applicable only to those cases that are tried after the date of the *Benton* case.

## CONCLUSION

The Respondent respectfully asks this Court to: (1) find that the instant case is distinguishable on its facts and thus not controlled by *Benton v. Maryland, supra;* (2) find that even if the instant case is controlled by the ruling in *Benton v. Maryland,* that decision should not be retrospective to those cases tried before the date of the *Benton* ruling, and (3) grant such other relief which is incidental to the foregoing.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing brief upon Counsel for the Petitioner Mr. Allyn M. Wallace, Attorney at Law, P. O. Box 8102, Savannah, Georgia 31402, his last-known address, by depositing same in the United States mail, properly addressed and postage prepaid.

This is to further certify that all parties required to be served have been served.

This 31st day of October, 1969.

/s/ MATHEW ROBINS

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MATHEW ROBINS
Assistant Attorney General